Supreme Court, U.S.
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Wisconsin Court of Appeals 02-0526-CR
Barron County Wisconsin District Court No. 99-CF-82

In the Supreme Court of the United States

SCOTT W. NAGEL,
Petitioner,

vs.

STATE OF WISCONSIN,
Respondent.

On Petition for Writ of Certiorari to the United States Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner denied due process of law at trial when the trial court admitted evidence of Petitioner's prior conviction in violation of Wisconsin Statutes § 904.04(2)?

2. Was Petitioner denied due process of law at trial when the trial court allowed an expert witness to testify as to a factual determination traditionally made by the jury in violation of Wisconsin Statutes § 907?

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CITATIONS OF OPINIONS

The opinion of the Wisconsin Court of Appeals, filed October 16, 2002, is unpublished. The order of the Wisconsin Supreme Court denying the Petition for Review pursuant to Wis. Stat. § 808.10 is dated February 19, 2003.

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BASIS FOR JURISDICTION

IN SUPREME COURT

The decision of the Wisconsin Court of Appeals was filed on October 16, 2002. On February 19, 2002, the Wisconsin Supreme Court denied Petitioner's Petition for Review of Decision of the Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment to the United States Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

Wisconsin Statutes § 904.04(2)

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. "

Federal Rules of Evidence Rule 404(b)

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to

show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

Wisconsin Statutes § 907.02

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as en expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

Wisconsin Statutes § 907.04

"Testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact."

STATEMENT OF THE CASE

On July 22, 1999, Petitioner was charged by a Complaint in the Barron County District Court, in the state of Wisconsin, with one count of recklessly causing bodily harm to a child by conduct which creates a high probability of great bodily harm, in violation of Wis. Stat. §§ 938.03(3)(c) and 948.03(5) for an incident that occurred on November 15, 1998.

On September 3, 1999, an Information was filed in the Barron County District Court, charging Petitioner with the same crime, but seeking a maximum penalty of $10,000 fine and/or 16 years imprisonment (an enhancement of $5,000 and/or 11 years for being a repeat offender) pursuant to Wis. Stat. § 939.62(1)(b). On September 15, 1999, at the Arraignment, Petitioner stood mute and the court entered a plea of not guilty on his

behalf.

On February 14, 2000, the State moved to introduce evidence of Appellant's prior bad acts at trial. A hearing on the matter was held on May 4, 2000, and the Court agreed to allow the admission of the evidence to show absence of mistake or accident. (Transcript dated May 4, 2000, pgs. 18-20; Appendix C, pgs. 2-4).

A jury trial was held from May 2 to May 4, 2001. Prior to voir dire, Petitioner's trial counsel, Owen Williams, noted that he would object to any expert testimony offered by the State as to who committed the acts alleged in the Complaint. The court indicated that the State's expert witness, Dr. Janice Ophoven, would be permitted to offer her opinion as to who caused the injuries suffered by Melissa Nagel. (Transcript. dated May 2, 2001, pgs. 13-17; Appendix D, pgs. 3-7).

On May 4, 2001, after approximately two and a half hours of deliberation, the jury found Petitioner guilty of recklessly causing bodily harm to a child by conduct which creates a high probability of great bodily harm as charged. The jury also found that, on November 15, 1998, Petitioner was responsible for the welfare of Melissa Nagel. On November 9, 2001, Appellant was sentenced to 6 years in prison, and Appellant was released pending appeal.

Petitioner appealed his conviction claiming that he was denied a fair trial due to the trial court's errors of admitting evidence as to the facts of Petitioner's 1993 conviction for battery to a child, and allowing the state's expert witness to testify as to a factual determination traditionally made by the jury. On October 16, 2002, the Wisconsin Court of Appeals denied Petitioner's appeal and

upheld the trial court's evidentiary rulings in their entirety. On February 19, 2003, the Wisconsin Supreme Court denied Petitioner's Petition for Review of the Decision of the Wisconsin Court of Appeals. This Petition follows.

REASONS FOR ALLOWANCE OF WRIT

(1) Wis. Stat. § 904.04(2) is written in language almost identical to that of Fed. R. Evid. 404(b). Regardless of which rule is applied in a given case, the effect of these evidentiary regulations is to ensure that a defendant in a criminal case is given a fair trial, that the jury in a criminal case is neither confused nor prejudiced by the introduction of "prior bad acts" evidence, and that the defendant is afforded due process of law. See Whitty v. State, 149 N.W.2d 557, 563 (Wis. 1967), and U.S. v. Cuch, 842 F.2d 1173 (10th Cir. 1988).

The character rule excluding prior crimes evidence

> as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated, and (4) the confusion of issues which might result from bringing in evidence of other crimes

Whitty, 149 N.W.2d at 563.

When considering the proper approach to take when confronted with such evidence, since 1967 the Wisconsin courts have adopted the balancing test as recommended by Rule 303 of the American Law Institute Model Code of Evidence, and in doing so took their guidance from the federal courts. See Whitty, 149 N.W.2d at 564-65, citing Spencer v. State of Texas, 385 U.S. 554 (1967) and Ross v. Maroney, 372 F.2d 53 (3rd Cir. 1967). That test requires the trial court "to carefully consider

whether the prejudice of other-crimes evidence is so great as compared with its relevancy and the necessity for its admission in the particular case as to require its exclusion." Whitty, 149 N.W.2d at 564.

In this case, the State of Wisconsin sought to introduce evidence of Petitioner's 1993 conviction, and the facts surrounding that conviction, in the Chippewa County District Court for battery of a child (a seven week-old infant). Specifically, the State elicited incredibly graphic testimony regarding the extent of the 1993 battery -- that the infant was severely bruised on eyes, cheek, nose, abdomen, right arm, right calf, buttocks and testicles. Any relevancy or probative value carried by the fact of Petitioner's 1993 conviction was surely outweighed by the unduly prejudicial effect that the specific testimony in question had on the jury, as even the trial court

acknowledged at sentencing.

> [S]ometimes I sit back and I wonder and I have some second thought about the trial in this case as to whether or not I should have allowed that first conviction in, because you wonder whether or not that jury would have reached the same conclusion had they not known that and that they really were making a decision on the evidence in the case as opposed to that simply because he did it before, whether that was too prejudicial. I don't know. Because from the evidence, it was a very close case.

Partial Transcript dated November 9, 2001, page 24; Appendix F, page 2.

(2) Similarly, the issue of whether certain expert testimony should be admissible in a criminal trial ultimately hinges on the question of whether the admission or suppression of the expert testimony will unduly influence the jury and deny a defendant his or her right to a fair trial (and, thus, due process of law). Pursuant to

Wis. Stat. § 907.02, expert testimony is admissible if such testimony will assist the trier of fact. Pursuant to Wis. Stat. 907.04, expert testimony is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. However, when expert testimony goes too far, to the point at which the expert testimony is no longer assisting the jury but instead wanders into the realm of ultimate facts to be decided by the jury, the right to a fair trial is compromised. This is especially the case when abuse of a child is at issue.

> This opinion testimony goes too far. Expert testimony should assist the jury. ... The credibility of a witness is ordinarily something a lay juror can knowledgeably determine without the help of an expert opinion. "[T]he jury is the lie detector of the courtroom." United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973). The opinion that Haseltine's daughter was an incest victim is an opinion that she is telling the truth. ... Haseltine's conviction depended on the jury believing the daughter's testimony. While there is some medical

> evidence corroborating her testimony that Haseltine threatened and beat her, her account of the sexual assault was not corroborated by independent evidence. Haseltine's entire defense consisted of witnesses who testified that the daughter was dishonest. Under these circumstances, the psychiatrists opinion, with its aura of scientific responsibility, creates too great a possibility that the jury abdicated its fact-finding role to the [expert] and did not independently decide Haseltine's guilt.

State v. Haseltine, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984).

In this case, the expert opinion testimony did go too far, testifying that the injuries to the victim (Petitioner's daughter) were caused during the time she was in the custody of Petitioner, which opinion was elicited by the State asking for an answer to a "hypothetical" situation where "the child was under the care of her father for an hour or so prior to losing consciousness; [and] that the father has given a variety of stories during that time ...." See Partial Transcript dated May 3, 2001, pages 30-34;

Appendix E, pages 5-7). This is not, as the State suggested on appeal, a case where Petitioner created his own problem by introducing the evidence himself. See, for example, Ohler v. United States, 529 U.S. 753, 755 (2000). Because the defense rested, to a large degree, on the jury believing the testimony of Petitioner and his wife, and because the specific expert opinion testimony was ultimately an opinion that Petitioner was lying -- the trial court clearly erred in admitting the testimony and Petitioner was denied his right to a fair trial and due process as a result.

Respectfully Submitted,

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APPENDIX

Appendix A: Decision of the Wisconsin Court of Appeals dated October 16, 2002..... A-1

Appendix B: Order of the Wisconsin Supreme Court dated February 19, 2003. ..... A-13

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COURT OF APPEALS DECISION

DATED AND FILED

October 16, 2002

Cornelia G. Clark

Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0526-CR Cir. Ct. No. 99-CF-82

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT W. NAGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Scott W. Nagel appeals a judgment convicting him of recklessly causing bodily harm to a child by conduct that creates a high probability of great bodily harm, as a habitual criminal, contrary to WIS. STAT. §§ 948.03(3)(c) and 939.62(1)(b).[1] Nagel argues that the trial court erred by admitting other acts evidence and allowing what Nagel claims was inadmissible expert witness testimony. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In July 1999, the State charged Nagel, as a person responsible for the welfare of a child, with recklessly causing bodily harm to that child by conduct which creates a high probability of great bodily harm. The charge arose from allegations that Nagel injured his seven-week-old daughter, Melissa. Nagel claimed that in his attempt to console

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

Melissa, he was holding her close to his face when she jolted forward suddenly, hitting her face against Nagel's face. When Melissa subsequently appeared to stop breathing, Nagel and his wife drove her to the Barron Medical Center.

¶3 Upon her admission to the emergency room, bruising, petechiae and a small laceration were noted as appearing on Melissa's head and facial area. Further examination suggested that Melissa was suffering from subdural hematoma and periodic "seizure like movements." The complaint alleged that Melissa's injuries were consistent with shaken infant syndrome.

¶4 Nagel was convicted upon a jury's verdict and sentenced to six years in prison. This appeal followed.

ANALYSIS

A. OTHER ACTS EVIDENCE

¶5 Nagel argues the trial court erred by admitting other acts evidence. Whether to admit evidence is addressed to the trial court's discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a

conclusion that a reasonable judge would reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶6 Here, the court admitted evidence regarding Nagel's 1993 conviction for battery of a child. In that case, Nagel was convicted of beating his then seven-week-old son. Detective Sergeant Mark Hanson testified regarding the injuries to Nagel's son that resulted in his 1993 conviction:

> I observed severe bruising on the face of the infant, particularly around the eyes. There were — there was bruising on both eyelids, upper and lower of the child. There was bruising on the right upper cheek of the child. The child's nose was swollen and bruised. I observed that he had smaller circular bruises on his abdomen, on his right upper arm, on his right calf; and then staff rolled him over and I observed severe bruising from the child's waistline down to mid-thigh on both sides, across both buttocks, including the child's scrotum, and the right testicle of the infant was also quite swollen.

Hanson also testified regarding his investigative interview with Nagel:

> I asked him for some specifics about how the child was injured and he said I did it. I did everything. Whatever you saw, I did. I lost my temper. ... I attempted to get him to explain in detail what happened to the child. I asked him to say, you know, what happened and he said I hurt him. I hit him

> everywhere. I asked him how the bruising occurred on the child's face and he said I hit him, and then he told me that he hit him several times with his hands in the face ... I next asked him about the bruising to the buttocks and he stated I spanked him. Look what I done to him.

¶7 In general, "evidence of other acts is not admissible because of the 'fear that an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged.'" ***State v. Gray***, 225 Wis. 2d 39, 49, 590 N.W.2d 918 (1999) (quoting ***State v. Sullivan***, 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998)). Consistent with this fear, the courts of this state have held that "[o]ther acts evidence may not be introduced to show that the defendant has a certain character trait and, in the present charge, acted in conformity with that trait." ***Gray***, 225 Wis. 2d at 49; see also ***Sullivan***, 216 Wis. 2d at 781-82.

¶8 The ***Sullivan*** court propounded a three-part analysis for determining the admissibility of other acts evidence. The first inquiry is whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake

or accident. ***Sullivan***, 216 Wis. 2d at 772-73. After ascertaining whether the other acts evidence is offered for a permissible purpose under § 904.04(2), the analysis tints to whether the other acts evidence is relevant,[2] and finally, whether its probative value outweighs the danger of unfair prejudice. *Id.*

¶9 Here, the court admitted the other acts evidence for an acceptable purpose under WIS. STAT. § 904.04(2)—namely, to show the absence of mistake or accident in the present case. With respect to the relevance inquiry, Nagel intimated that he may have accidentally caused Melissa's injuries. In ***State v. Bustamante***, 201 Wis. 2d 562, 574-77, 549 N.W.2d 746 (Ct. App. 1996), this court concluded that evidence of a defendant's involvement in the physical abuse of another child was relevant to prove the absence of mistake or accident when the defendant claimed he committed the charged criminal act accidentally. Thus,

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[2] In assessing relevance, we must first consider whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

evidence of Nagel's 1993 conviction was relevant to negate his statements and rebut his claim of accidental injury.

¶10 With respect to the third inquiry, Nagel argues that the trial court failed to properly assess the probative value of the other acts evidence and further failed to balance that probative value against the danger of unfair prejudice. We are not persuaded. The probative value of other acts evidence depends in part upon its "nearness in time, place and circumstance to the alleged crime or element sought to be proved." ***State v. Plymesser***, 172 Wis. 2d 583, 595, 493 N.W.2d 367 (1992).

¶11 Here, Nagel's son and daughter were extremely close in age (both around seven weeks old) at the time of the incidents leading to their respective injuries. At the time of their injuries, both children were in Nagel's physical care and both were crying and fussing. Finally, both infants received serious injuries requiring emergency medical attention. Although the incidents were five years apart, other acts evidence is not rendered irrelevant if the remoteness is balanced by the similarity of the two incidents. *See* ***State v. Mink***, 146 Wis. 2d 1, 16, 429 N.W.2d 99 (Ct. App. 1988).

¶12 Finally, the trial court properly concluded that the probative value of the evidence outweighed the danger of unfair prejudice. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means." ***Sullivan***, 216 Wis. 2d at 789-90. The concern is that a jury may conclude that because the defendant committed the prior acts, he necessarily committed the charged crimes. ***Id.*** at 790. In ***State v. Davidson***, 2000 WI 91, 236 Wis. 2d 537, ¶75, 613 N.W.2d 606, our supreme court recognized, however, that "similarities between the other crimes evidence and the charged crime may render the other crimes evidence highly probative, outweighing the danger of prejudice." Moreover, the jury was twice instructed that evidence of Nagel's 1993 conviction could be considered only with regard to the absence of mistake or accident. The jury was specifically told not to consider the other acts evidence as proof "that the defendant is a bad person and for that reason is guilty of the offense charged." We presume the jury followed the court's instructions. ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). We therefore conclude that the trial court reasonably exercised its discretion by admitting the other acts evidence.

B. ADMISSION OF EXPERT WITNESS TESTIMONY

¶13 Nagel argues that the trial court erred by allowing what Nagel claims was inadmissible expert witness testimony. The admission of expert testimony is within the trial court's discretion. ***State v. Brewer***, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App. 1995). This court will not reverse the trial court's decision to admit or exclude expert testimony if the decision was reasonable and if "it was made 'in accordance with accepted legal standards and in accordanqe with the facts of the record.'" ***Id.***

¶14 At trial, the State sought to introduce Dr. Janice Ophoven as a trial witness. Ophoven, a forensic pathologist, had issued a written opinion stating: "Based on the medical records and investigative reports provided to me, it is my opinion that [Melissa] suffered her serious and probably permanent injuries at the hand of her father." Nagel objected to the State's request to call Ophoven at trial, arguing that Ophoven's opinion as to who committed the acts would invade the province of the jury and that Ophoven's expertise "goes to medical issues and not issues of who may have caused the certain condition." In response, the State argued that Ophoven would testify "that the

shaking would have occurred just moments before the child stopped breathing," and that evidence, combined with the fact that Nagel was the only person with the child at the time of her injury would allow Ophoven to opine that Nagel inflicted the injuries on his daughter. The circuit court agreed, noting that the underlying facts supporting Ophoven's opinion could be attacked on cross-examination.

¶15 On direct examination, Ophoven testified that Melissa suffered severe, nonaccidental head trauma as the result of intense shaking and possible impact. Ophoven further opined that a seven-week-old child is not sufficiently developed to "head-butt" or lunge forward with enough force to cause the injuries she sustained. Ultimately, Ophoven testified: "It's my opinion based on the materials that I've been provided and my examination and my experience and training as a forensic pathologist, that this child suffered head injury during the time that she was in the custody of her father."

¶16 On cross-examination, defense counsel asked: "Doctor, make sure I got this right. Did you just tell us that you suffered—indicated you felt she suffered head injuries at the hand of her father?" Ophoven responded: "While she was

in the custody of her father, yes, while she was with her father."

¶17 Nagel claims the trial court erroneously allowed Ophoven "to testify as to a factual determination traditionally made by the jury." In other words, Nagel believes Ophoven's testimony was tantamount to an expert opinion that Nagel was guilty of the charged crime. We disagree.

¶18 First, Nagel's cross-examination resulted in Ophoven's testimony that Melissa's injuries were caused by Nagel. On direct examination, the State limited Ophoven's opinion to the nature and timing of Melissa's injuries. Although this testimony supports the inference that Nagel caused Melissa's injuries, it was defense counsel that asked whom Ophoven believed actually inflicted the injuries. Because Nagel caused the evidence to be introduced on cross-examination, he cannot now claim reversible error as a result of the admission. ***See Ohler v. United States***, 529 U.S. 753, 755 (2000).

¶19 Moreover, Nagel fails to appreciate the distinction between opinions regarding guilt and opinions regarding cause. Ophoven did not opine that Nagel was

guilty of the charged crime; rather, she testified that in her opinion, Nagel caused Melissa's injuries. The jury was still left with the task of applying the facts of record to the controlling principles of law to determine whether Nagel was guilty. We discern no error.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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February 19, 2003

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You are hereby notified that the Court has entered the following order:

No. 02-0526-CR State v. Nagel L.C. #99CF82

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Scott W. Nagel, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark

Clerk of Supreme Court

STATE OF WISCONSIN CIRCUIT COURT

BARRON COUNTY

STATE OF WISCONSIN MOTION HEARING

Plaintiff, Case No. 99 CF 82

Vs.

SCOTT W. NAGEL,

Defendant.

The above-entitled matter came on to be heard before the Honorable Edward R. Brunner, Circuit Court Judge, Branch 2, on the 4th day of May, 2000, at the hour of 1:05 p.m., in the courthouse, City of Barron, County of Barron, State of Wisconsin.

APPEARANCES

JAMES C. BABLER, District Attorney, Barron County Courthouse, Barron, Wisconsin, 54812, appearing as counsel on behalf of the State.

OWEN R. WILLIAMS, 314 Keller Avenue North, Suite 16, Amery, Wisconsin, 54001, appearing as counsel on behalf of the Defendant.

SCOTT W. NAGEL, the Defendant, appearing personally.

...representation that they intend to offer this on the possibility that Mr. Nagel may interpose accident or mistake, what if he elects not to testify? At that point when he elects not to testify, the jury has heard that he's battered babies in the past.

THE COURT: It's not just his testimony. If his defense is through the provision of expert testimony that this was an accident - -

MR. WILLIAMS: What if he represents - what if he doesn't present that?

THE COURT: Then I think the Court would probably limit the State's offer of that evidence to rebuttal.

MR. BABLER: Judge, if I may, the State always has the burden. They could just get up in argument - final argument and say this could have been an accident; I mean, that is always available for any juror to think, well, okay, there is - this could have been an accident. How did this - because we have to - beyond any reasonable doubt, and one of the things we have to disprove in cases is it wasn't an accident.

MR. WILLIAMS: The jury is going to be told they have to decide the case on the evidence and that the attorney's remarks are not evidence. I think that fails.

THE COURT: Well irrespective of that last argument, I believe that this hits on all three cylinders of the Sullivan test and it conforms with the most recent Court of Appeals decision in Edmunds that this is similar facts. It fits clearly, and Mr. Babler has outlined that clearly in his diagram of how this case fits together with the case dealing with Melissa; that, in fact, the evidence fits into one of the statutory exclusions in that it explains away the argument of accident or mistake

It's certainly relevant to the charge, and clearly, I believe that it is highly probative of acts and I think it outweighs any undue prejudice because of the fact that you have the opportunity have spent a great deal of this Court's time and postponed the trial to bring in witnesses that are going to claim that this is an accident. And in that case, this isn't so highly prejudicial that it outweighs its probative value and the prejudice is so strong that it would result in an unfair trial and a biased trial to a jury.

In this case, I think it's part of the evidentiary package that fits into the concept of child abuse and the alleged crime committed here, and particularly in light of the fact that there is going to be expert testimony claiming that this type of injury could be caused by an accident and most likely in this case was, under those circumstances, I don't think that the State -- I think it would be prejudicial to the State not to allow this particular evidence to come in.

How it will be used at trial and whether it's case in chief, whether it's rebuttal, I reserve a final ruling on that as we get closer to trial and as we see how the discovery proceeds with regard to the defense's expert. And please get that date today so that we can get this matter on the calendar. It's been now almost two months since it was originally supposed to go to trial.

(Proceedings concluded at 1:35 p.m.)

STATE OF WISCONSIN CIRCUIT COURT

BARRON COUNTY

STATE OF WISCONSIN,

Plaintiff, JURY TRIAL

vs. Case No. 99 CF 82

SCOTIT W. NAGEL, Volume 1

Defendant.

The above-entitled matter came on to be heard before the Honorable Edward R. Brunner, Circuit Court Judge, Branch 2, and a jury, on the 2nd day of May, 2001, at the hour of 8:30 a.m., in the courthouse, City of Barron, County of Barron, State of Wisconsin.

APPEARANCES

JAMES C. BABLER, District Attorney, Barron County Courthouse, Barron, Wisconsin, 54812, appearing as counsel on behalf of the State.

OWEN R. WILLIAMS, 314 Keller Avenue North, Suite 16, Amery, Wisconsin, 54001, appearing as counsel on behalf of the Defendant.

SCOTT W. NAGEL, the Defendant, appearing personally.

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...granted and can be easily handled at the time and when you have an opportunity to see the foundation.

THE COURT: I'm going to have to hear the experts' testimony and see if the door is opened for you to explore that and then talk about the child's condition at the present time, whether that would have any bearing on their opinion. I assume that you've deposed some of these people already. No?

MR. WILLIAMS: Remember we don't have criminal deposition, but we did have the testimony of Doctor Morgenstern by - - which has been recorded deposition pursuant to your order.

On one point I would like to comment. I can advise the Court I will be making vigorous objection to any opinions of Doctor Ophoven as to whom committed these acts based upon her opinion letter that she's given the

District Attorney goes so far as to invade the province of the jury where she says I believe that these have been caused by the father. .And I believe that if that is to come in either before or over my objection, that creates a strong presumption of mistrial, and I think the District Attorney should be aware that Doctor Ophoven's expertise goes to medical issues and not issues of who may have caused the certain condition.

THE COURT: Mr. Babler?

MR. BABLER: Judge, that just isn't the case. She will testify that the shaking would have occurred just moments before the child stopped breathing. The father was the only person with the child. She can conclude as an expert if he was the only person there that he committed that injury. That's what experts do, Judge. They put all the facts together and give an opinion. It may be bad for the defendant, but that doesn't make inadmissible and it doesn't make it any grounds for mistrial

MR. WILLIAMS: I've voiced my concerns and I'm content to live with that. I can tell you this, that there will be strong counter testimony as to the nexus of time lag between onset of cause and symptom. That will be through Doctor

Plunkett and Reese article which he published in the Journal of Forensics for the Journal of the American Medical Association. But in any case, I'm just suggesting that I bring this to your attention so that you aren't called to make a hasty ruling and that so you can be considering whether or not she's --

THE COURT: Mr. Babler, how is that -- if you a forensic expert that testifies of the mechanism of death of, let's say, a murder victim and you don't have that person testify as to who committed the crime, give an opinion as to who committed the crime. Why would she be giving an opinion as to who would have committed this? Doesn't - you put it - it's like anything else. You put the relevant facts in and say I have an opinion that this baby was shaken and this was an intentional act or a negligent act - - criminally negligent act. It's up to the jury to conclude who the person was that was last in touch with the child. The medical expert doesn't say I think the father did it or I think the mother did it.

MR. BABLER: Actually medical examiners normally do that, Judge. A pathologist, because it's forensic, they put together facts along with the medical evidence.

They are not merely excluding doctor – just a simple physician who just testifies as to the medical diagnosis. What happens here is she will be able to give an opinion because it has to do with the timeliness. If there was more than one person that was caring for the child at the same time she wouldn't be able to give that opinion, and that's what the real difference is. You put the facts as known, and using her medical knowledge, give an opinion as to what occurred, and it would be her opinion that the only person that could have done this is the father because of the onset of the symptoms, because it will be within 25 minutes, and the defendant, as you will hear the testimony which I think will be undisputed, cared for the child for probably an hour or two solely before any of this occurred, Judge, and so putting all that together, the only conclusion, based upon her medical knowledge, and I understand that Mr. Williams has a doctor that says that shaken baby syndrome does not exist and it could not happen, and that's certainly a defense that can be raised.

THE COURT: So she's going to testify that the nature of the injuries that she has read about or observed through medical evidence, that she believes it occurred within a short time frame.

MR. BABLER: From the onset of the symptoms, where in this case the child stopped breathing, the child lost consciousness.

THE COURT: And she puts that well within the hour.

MR. BABLER: Within minutes. And I understand Mr. Williams' expert disputes that medical evidence. Their doctor is one who has a viewpoint which is contrary to the generally accepted opinion in the medical community, but it's certainly one which they can bring out as a defense, but that doesn't mean that the State can't bring forth this particular medical testimony, Judge.

THE COURT: Mr. Williams?

MR. WILLIAMS: Am I allowed then to ask my doctor if he thinks that my client did it based on what he has read?

THE COURT: I suppose so.

MR. BABLER: I believe that's -

MR. WILLIAMS: That doesn't make sense. That doesn't make sense. That's the jury's province to make inferences from fact. But bolstering this with a physician

who has never examined the child, who has never interviewed my client and who has -- if you look in this case --

THE COURT: You've just laid out your cross-examination.

MR. WILLIAMS: I know and I understand that, but I don't think that this physician, Doctor Ophoven, is qualified to come to a conclusion that is that for the jury to reach.

THE COURT: Well if she is truly a forensic pathologist and the credentials indicate that she can give that opinion, then I suppose she can. We have the open door on expert opinion in Wisconsin, and if it fits, I suppose she's permitted to give that opinion as your expert is, and both experts then are subject to the test of rigorous cross-examination as to whether they can -- how they can support these opinions.

I know that having read the report of their doctor, he claims that it could not have happened the way the State's doctors say by what is commonly known as shaken baby or shaken impact syndrome. That he has other issues of it can be accidental falls, all those types of things. I know that's going to be there.

THE COURT: That's the defense.

MR. BABLER: That is the defense. They may have several defenses within that, but its case beyond a reasonable doubt putting it in in our case in chief

MR. WILLIAMS: What I don't understand is the nexus. This is not charged as an intentional charge, and they are putting in evidence of intentional act at the time where my client admitted he struck, which I think is presumed to be intentional, and in this case, I just want to caution the District Attorney that I will be objecting if there is anything other than for absence of mistake or presence of accident – or absence.

I think what I'm -- before we give -- before this testimony is presented to the jury, I'm going to ask the Court to present the cautionary instruction to them and tell them that it's not for propensity or not to show intent, but it's to show absence -- just show the very limiting factors that the District Attorney has procured your approval for its introduction.

THE COURT: Why don't you write up what you believe is the appropriate instruction f or that.

MR. WILLIAMS: The cautionary instruction is in the pattern. I will have that -- I'll get that.

MR. BABLER: I've requested it in the –

THE COURT: I'm familiar with that. I thought you were talking for more than the pattern.

MR. WILLIAMS: No, no, I just think that the cautionary instruction should be read before that so the jury -

THE COURT: I don't have any problem with doing that.

MR. BABLER: And I don't either, Judge. I have to tell the Court that I also believe that this goes to identity because if - I think it's inextricably linked with the absence of mistake or accident that this defendant was caring for the child, and it's an indication in a case they have testimony that someone else could have done this, Judge.

MR. WILLIAMS: Now the Court's ruling, as I understand it, I have the transcript there, I did order a transcript in that to deal with this, but was that one of the three grounds that you indicated at the time, Mr. Babler?

THE COURT: What was that you were going to say?

MR. WILLIAMS: I was just wondering what you ruled at the preliminary hearing on this.

THE COURT: To be honest with you, I don't have a present recollection.

MR. BABLER It was absence of mistake or accident, Judge, at the time, but I'm telling you as the further preparation in looking through the reports, especially of Doctor Plunkett, it may be that they are claiming that someone else could have done this. I don't know that that's true. I'm just saying there may also be an additional ground for the introduction of that, but that really has to do with how the testimony develops at this trial.

THE COURT: All right. Is there anything else you want on the record?

MR. BABLER: I don't believe so, Judge.

MR. WILLIAMS: No.

THE COURT: Who is your court officer?

MR. BABLER: I don't have one.

THE COURT: I need to do a quick orientation with this jury. I don't want to cut you short. Is there anything else we need on the record at this time?

MR. BABLER: No.

STATE OF WISCONSIN CIRCUIT COURT

BARRON COUNTY

STATE OF WISCONSIN,

Plaintiff, JURY TRIAL

vs. Case No. 99 CF 82

SCOTT W. NAGEL, Volume 2

Defendant.

The above-entitled letter came on to be heard before the Honorable Edward R. Brunner, Circuit Court Judge, Branch 2, and a jury, on the 3rd day of May, 2001, at the hour of 8:34 a.m., in the courthouse, City of Barron, County of Barron, State of Wisconsin.

APPEARANCES

JAMES C. BABLER, District Attorney, Barron County Courthouse, Barron, Wisconsin, 54812, appearing as counsel on behalf of the State.

OWEN R. WILLIAMS, 314 Keller Avenue North, Suite 16, Amery, Wisconsin, 54001, appearing as counsel on behalf of the Defendant.

SCOTT W. NAGEL, the Defendant, appearing personally.

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...might see these kinds of injuries to a child seven weeks old?

A In a seven-week old who was unrestrained in a motor vehicle accident or restrained in a motor vehicle accident would probably be more likely because there is not significant impact injury to the baby. Acceleration-deceleration injuries can occur from falls from a significant height. There is some patterns that are different here, but the rotational acceleration-deceleration can occur from that. And then again, depending on with or without the pattern of injury that we see here, the rotational accelerational-

decelerational injury can occur in almost any environment where the head moves fast and stops suddenly.

Q Doctor Ophoven, just finally one other question. Based upon your training and experience, both in pediatrics and forensic pathology and based upon your review of all the medical reports and police reports, do you have an opinion to a reasonable degree of medical certainty as to how, in this case, Melissa Nagel's injuries occurred?

MR. WILLIAMS: Objection, lack of foundation, invades the competency of this witness. There is information here from reports which are not medical and it invades the province of the jury and presents the ultimate question and determination by this witness.

THE COURT: Mr. Babler, perhaps some additional foundational testimony would be helpful with regard to the police reports.

Q Doctor Ophoven, in this particular case, and take this as -- let's do it as a hypothetical then. Taking hypothetically that in this case the evidence shows that the child was under the care of her father for an hour or so prior to the child losing consciousness; that the father has given a variety of

stories during that time, what appear to be several different versions, whether it be --

MR. WILLIAMS: Objection, District Attorney is characterizing evidence here.

THE COURT: Overruled. Proceed.

Q Whether he had been feeding the child or changing the child's diaper, but based upon that information from police reports, then putting that together with medical information, do you have an opinion to a reasonable degree of medical certainty as to how these injuries occurred?

A Yes, I do.

Q And what is that?

MR. WILLIAMS: Same objection.

THE COURT: What's missing foundationally in the testimony that's been given today, Mr. Williams?

MR. WILLIAMS: District Attorney is asking for medical testimony from a person who is qualified as a medical expert based upon facts which are not established in a medical province which are in conflict between the reporters who are lay people. We have testimony of police

officers which are lay persons, the statement of my client which do not relate to the medical expertise of this witness.

THE COURT: Well certainly Doctor Ophoven's medical expertise has been clearly identified. She's now being asked to testify forensically as to, given the history of this case and the statements made by the various parties, as to who she believes would have been in the position to shake this baby. She's certainly subject to cross-examination, and that opinion is also something that can be challenged.

MR. WILLIAMS: Judge, I think you properly stated who is in a position to shake the baby if the baby was shaken, but as to her belief, I do not believe that she may invade the province of the jury and go to ultimate issue and in effect to say in her mind and give her opinion as to who did what. She may testify as to what she has observed, what her medical expertise leads her to deduce, but she may not dome in and tell who she thinks did some act which is not supported by direct evidence.

THE COURT: Mr. Babler?

MR. BABLER: Judge, this is exactly what forensics means, is putting facts and interpreting them for the Court, and part of the medical diagnosis as other doctors have said

is the history prior to that child coming in. It's nothing different than the doctor making a diagnosis in a hospital. They use the history provided by other people to make that diagnosis.

THE COURT: Mr. Williams, under the Wisconsin expert testimony rule, once there have been the minimal credentials shown, an expert can give his or her opinion. That opinion is subject to cross-examination and it's subject to the facts upon which it is based and it's up to the trier of fact, the jury to decide how much weight to give to any expert's opinion. In fact, the jury instruction says that the opinions are given for the jury's assistance in making the decision, but they don't have to accept any expert's opinion, so they will be given that instruction. But she's permitted to give her opinion.

Q (Mr. Babler continuing.) And what is your opinion, Doctor Ophoven?

A It's my opinion based on the materials that I've been provided and my examination and my experience and training as a forensic pathologist, that this child suffered head injury during the time that she was in the custody of her father.

MR. BABLER: Judge, I have no further questions of Doctor Ophoven.

CROSS-EXAMINATION BY MR. WILLIAMS:

Q Doctor, make sure I got this right. Did you just tell us that you suffered - - indicated you felt she suffered head injuries at the hands of her father?

A While she was in the custody of her father, yes, while she was with her father.

Q All right. And the head injuries, Doctor, you've told us are, with specificity now are?

A I've talked the basic injury mechanism is rotational acceleration-deceleration injury.

Q What does that mean? Did it cause her to swallow her tongue or something? What was the injury to the body?

A The injury to the body was tearing of tissue that resulted in brain swelling, bleeding in the subdural space, contusions to the brain, severe retinal damage and injuries to her face.

Q Now Doctor - all right. Now I know what your opinion is. Doctor, tell me - tell us about the Crackleberry...

STATE OF WISCONSIN CIRCUIT COURT

BARRON COUNTY

STATE OF WISCONSIN,

Plaintiff, SENTENCING

vs. Case No. 99 CF 82

SCOTT W. NAGEL,

Defendant.

The above-entitled matter came on to be heard before the Honorable Edward R. Brunner, Circuit Court Judge, Branch 2, on the 9th day of November, 2001, at the hour of 3:07 p.m., in the courthouse, City of Barron, County of Barron, State of Wisconsin.

APPEARANCES

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SCOTT W. NAGEL, the Defendant, appearing personally.

All of us are concerned about children and the protection of children. Mr. Babler and I spend a great deal of our working days in cases doing just that, year in and year out. And sometimes I sit back and I wonder and I have some second thoughts about the trial in this case as to whether or not I should have allowed that first conviction in, because you wonder whether or not that jury would have reached the same conclusion had they not known that and that they really were making a decision on the evidence in the case as opposed to that simply because he did it before, whether that was too prejudicial. I don't know.

Because from the evidence, it was a very close case. Clearly people believe that shaken baby syndrome espoused that in their expert testimony and those that don't espouse it in their expert testimony. Arid I agree with Mr. Babler, this doesn't have - he didn't have to prove intent here, it was a negligence case, and I think that has to be factored into a sentencing too.

And then you take Mrs. Mathieu's extremely articulate and compelling letter about two and a half years of

regular contact with Mr. Nagel and the child, and she doesn't have any axe to grind as I can see it. She works for an agency whose business it is to protect children as well and she's placing her opinion on the...